No. 17-130

In the Supreme Court of the United States

RAYMOND J. LUCIA
AND RAYMOND J. LUCIA COMPANIES, INC.,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.[1]

Businesses are frequently respondents in enforcement actions brought by the Securities and Exchange Commission (SEC). The Chamber accordingly has an interest in ensuring that the power to preside over those proceedings and to affect the interests of those businesses is vested in officials who are appointed in accordance with the requirements of the Constitution.

SUMMARY OF ARGUMENT

Administrative law judges (ALJs) presiding over enforcement actions brought by the SEC exercise very substantial authority.

Hundreds of companies and individuals have their rights and interests adjudicated in such pro-

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

ceedings each year. Recent statutory changes expanded the authority of these ALJs, authorizing them to preside over enforcement actions against virtually all companies and individuals and to impose remedies and penalties as broad as those available in an action in federal court.

Perhaps not coincidentally, the SEC has increased its use of administrative proceedings, where the Commission enjoys a higher rate of success and defendants are afforded fewer rights and protections than they are in federal courts.

These realities underscore the importance of ensuring that ALJs are appointed in a transparent and politically accountable manner. But they are not: Instead, they have been appointed through a complicated process involving numerous individuals who are several steps removed from elected officials—a process that not even the Commission's Division of Enforcement has been able to describe with confidence or accuracy.

This diffuse and opaque method of appointment is incompatible with the Appointments Clause. The Framers recognized that "the power of appointment to offices" was one of "the most insidious and powerful weapon of eighteenth century despotism." *Freytag* v. *Commissioner*, 501 U.S. 868, 883 (1991) (internal quotation omitted). The Framers sought to prevent abuse of the appointment power by limiting its dispersion and ensuring that "those who wielded it were accountable to political force and the will of the people." *Id.* at 884.

For that reason, all officers—*i.e.*, any official "exercising significant authority pursuant to the laws of the United States," *Buckley* v. *Valeo*, 424 U.S. 1, 126

(1976)—must be appointed by the President "with the Advice and Consent of the Senate," or, in the case of inferior officers, by "the President alone, in the Courts of Law, or in the Heads of Departments," as directed by Congress. U.S. Const. art. II, § 2, cl. 2.

This Court's precedents compel the conclusion that SEC ALJs are "officers" subject to the Appointments Clause. In *Freytag*, the Court held that special trial judges of the Tax Court qualify as "officers" based on characteristics and functions that are essentially indistinguishable from those of SEC ALJs—including "tak[ing] testimony, conduct[ing] trials, rul[ing] on the admissibility of evidence, and hav[ing] the power to enforce compliance with discovery orders." See 501 U.S. at 881-882. This exercise of "significant authority" renders both special trial judges of the Tax Court and SEC ALJs "officers" under the Appointments Clause.

In holding otherwise, the three-judge panel of the D.C. Circuit improperly dismissed this substantial collection of powers and the meaningful impact the Commission's increased use of SEC ALJs has on the business community, and elevated a single factor—SEC ALJs' purported lack of final decision-making authority—to dispositive status.

That analysis cannot be reconciled with the Court's decisions in *Freytag* and subsequent cases, which expressly rejected the argument that quasi-judicial officials must possess authority to enter final decisions to qualify as "officers" subject to the Appointments Clause. Nor can it be reconciled with the purpose of the Appointments Clause to "preserve political accountability relative to important government assignments." *Edmond* v. *United States*, 520 U.S. 651, 663 (1997).

This Court should reaffirm the Framers' limits on the appointment power and hold that SEC ALJs are inferior officers.

ARGUMENT

I. SEC ALJs Exercise Very Substantial Government Power.

Recent statutory changes have expanded the categories of persons who may be targeted through administrative actions and the remedies available to the SEC in such actions. These changes have enabled the Commission to bring many more enforcement actions in administrative proceedings before SEC ALJs, where the Commission has enjoyed a higher rate of success than it does in court.

That disparity, coupled with the reduced protections for respondents in administrative proceedings compared to enforcement actions in court, highlights the importance of ensuring compliance with constitutional requirements governing the appointment of the officials who preside over these administrative proceedings.

A. The Expanded Authority Of SEC ALJs

Recent statutory changes have expanded both the reach of SEC administrative proceedings and the range of available sanctions in those proceedings.

The Commission's ability to proceed through administrative proceedings was initially quite limited. These actions could be brought only against registered entities, and the only available relief was a "stop order" to halt an offering of securities to the public (see Securities Act of 1933, Pub. L. No. 73-22, § 8, 48 Stat. 74, 79-80) or rejecting an application for or revoking the registration of a broker-dealer or in-

vestment adviser (see Securities Exchange Act of 1934, Pub. L. 73-291, § 15, 48 Stat. 881, 895-896; Investment Company Act of 1940, Pub. L. 76-768, § 203, 54 Stat. 789, 850-852).

In the ensuing decades, the powers and jurisdiction of the SEC ALJs expanded, but until 2009, the authority to impose monetary penalties against persons or entities not registered with the Commission was for the most part limited to federal district courts. See, *e.g.*, Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. 101-429, §§ 102, 202-203, 301, 401, 104 Stat. 931, 933-935, 937-940, 941-945, 946-949. See also Andrew Ceresney, Dir., SEC Div. of Enft, Remarks to the American Bar Association's Business Law Section Fall Meeting (Nov. 21, 2014) (Ceresney Remarks), sec.gov/News/Speech/Detail/Speech/1370543515297 ("Until 2010, while we could proceed against unregistered persons in administrative proceedings, the relief that we could obtain against them was limited.").

In 2010, however, with the passage of the Dodd-Frank Act, the Commission gained the power to obtain through administrative proceedings virtually the same relief—including substantial monetary penalties—against the same broad set of individuals and entities that it could sue in federal district court. See *Ibid.* ("In the Dodd-Frank Act, * * * Congress provided us authority to obtain penalties in administrative proceedings against unregistered parties comparable to those we already could obtain from registered persons."); Jed S. Rakoff, *PLI Securities. Regulation Institute Keynote Address: Is the S.E.C. Becoming a Law Unto Itself?* 5 (Nov. 5, 2014) (Rakoff), perma.cc/4JBL-KRPW ("The net result of all this is that the S.E.C. can today obtain through

internal administrative proceedings nearly everything it might obtain by going to court."); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 929P, 124 Stat. 1376, 1862-1865.

Now the Commission can proceed administratively against *any* person or entity. See 15 U.S.C. 77h-1, 78u-3(a), 80a-9(f), 80b-3(k). And it can obtain in those proceedings monetary and other civil penalties such as fines (including against unregistered persons) (see *id.* §§ 77h-1(e) and (g), 78u-2, 78u-3(e), 80a-9(d) and (e), 80b-3(i) and (k)); cease and desist orders (see *id.* §§ 77h-1, 78u-3(a), 80a-9(f), 80b-3(k)); and collateral bars prohibiting individuals from associating with entities regulated by the SEC (see *id.* §§ 78o(b)(6)(A), 78o-4(c)(4), 78q-1(c)(4)(C), 80b-3(f)).

B. The Commission's Increased Use of Its In-House Administrative Proceedings

The expansion of SEC ALJs' authority paved the way for a dramatic shift in the SEC's use of administrative proceedings.

The Director of the Commission's Division of Enforcement, Mr. Ceresney, announced in 2013 that the SEC intended to funnel enforcement actions into administrative proceedings before SEC ALJs as opposed to federal court: "Our expectation is that we will be bringing more administrative proceedings given the recent statutory changes." Gretchen Morgenson, *At the S.E.C., a Question of Home-Court Edge*, N.Y. Times, Oct. 5, 2013, goo.gl/eJfeoG.

A year later, Mr. Ceresney confirmed that "[t]here is no question that we are using the administrative forum more often now than in past years, giv-

en the changes under Dodd-Frank." Ceresney Remarks, *supra*, page 5; see also Jean Eaglesham, *SEC Is Steering More Trials to Judges It Appoints*, Wall Street J., Oct. 21, 2014, goo.gl/WwLm7H (quoting head of SEC's anti-foreign-corruption enforcement unit as saying that "[i]t's fair to say it's the new normal" to use administrative judges).

The data confirms that statement. In 2014, the Commission instituted 610 administrative proceedings—more than double the number instituted in 2005. Ryan Jones, *The Fight Over Home Court: An Analysis of the SEC's Increased Use of Administrative Proceedings*, 68 SMU L. Rev. 507, 509 (2015). See also SEC, *Select SEC and Market Data: Fiscal 2014* 3, sec.gov/files/secstats2014.pdf. Indeed, the increased use of administrative proceedings was so dramatic that, in late 2014, the Commission almost doubled the number of SEC ALJs by adding two new ALJs. See SEC, *Press Release: SEC Announces New Hires in the Office of Administrative Law Judges* (June 30, 2014), perma.cc/TZ5U-HBJ6; Yaron Nili, *SEC Enforcement Developments in 2014, and a Look Forward*, Harv. L. Sch. F. on Corp. Governance & Fin. Reg. (Mar. 18, 2015), perma.cc/A9QL-LWBW.

C. The Commission's Increased Use Of Administrative Proceedings Adversely Affects Companies And Individuals.

The Commission's decision to utilize administrative enforcement proceedings rather than actions in federal court was not a neutral forum change. Significant differences between the proceedings impact the rights and interests of companies and individuals subject to the SEC's regulations and enforcement authority. The decision to focus on administrative proceedings has raised serious questions of fairness for

those businesses and individuals. See U.S. Chamber of Commerce, *Examining U.S. Securities and Exchange Commission Enforcement: Recommendations on Current Processes and Practices* (July 2015) (U.S. Chamber SEC Enforcement Report).

First, the Commission enjoys a higher rate of success in its proceedings before SEC ALJs than in civil court actions. Between October 2010 and March 2015, the SEC won 90% of the cases it brought before its ALJs, as compared with 69% of cases before district court judges. Jean Eaglesham, *SEC Wins With In-House Judges*, Wall Street J., May 6, 2015, goo.gl/N5FgXV.

The Commission won *every one* of the 219 administrative decisions issued between October 2013 and January 2015. Jones, 68 SMU L. Rev. at 509.

Many commentators, including one Commissioner, have asserted that this "home court" advantage is the reason why the Commission shifted enforcement cases into administrative proceedings: "[T]his change has the appearance of the Commission looking to improve its chances of success by moving cases to its in-house administrative system." Michael S. Piwowar, Comm'r, SEC, Remarks at the "SEC Speaks" Conference 2015: A Fair, Orderly, and Efficient SEC (Feb. 20, 2015), sec.gov/news/speech/022015-spchcmsp.html#_ftnref3.

Indeed, for several years after Dodd-Frank's enactment, the Commission rarely brought insider trading cases in administrative proceedings. Following a string of high-profile insider trading losses, however, the SEC announced its intention to start bringing more insider trading cases in administrative proceedings. See Ronald E. Wood, *SEC May*

Ramp Up Administrative Proceedings, Daily Journal Supplement, July 23, 2014, at 7, goo.gl/xpyuNT; Brian Mahoney, *SEC Could Bring More Insider Trading Cases In-House*, Law360 (June 11, 2014), perma.cc/5QNS-79VP. And it did. See SEC, *Select SEC and Market Data: Fiscal 2016* 3, sec.gov/files/2017-03/secstats2016.pdf; Jean Eaglesham, *SEC Is Steering More Trials to Judges It Appoints*, Wall Street J., Oct. 21, 2014, goo.gl/WwLm7H.

Second, the procedural rules applicable in administrative proceedings before ALJs differ from federal court cases in several ways that meaningfully impact the ability of charged parties to present a full defense.

For example, pre-hearing discovery is limited, respondents have a shorter period of time to prepare for a hearing, the evidentiary safeguards of the Federal Rules of Evidence do not apply, and there is no right to a jury trial. See U.S. Chamber SEC Enforcement Report at 11-21; Joseph A. Grundfest, *Fair or Foul?: SEC Administrative Proceedings and Prospects for Reform Through Removal Legislation*, 85 Fordham L. Rev. 1143, 1156-1165, 1169-1174 (2016) (Grundfest); Stephen J. Choi & A.C. Pritchard, *The SEC's Shift to Administrative Proceedings: An Empirical Assessment*, 34 Yale J. on Reg. 1, 13-14 (2017) (Choi & Pritchard).

The lack of discovery and shorter trial preparation time is particularly harmful, because the SEC staff—by contrast—may take years to investigate and develop a case, during which time it has essentially unfettered authority to request documents and interview witnesses. See Grundfest at 1158. The imbalance between the SEC and defendants in admin-

istrative proceedings has raised concerns about the fairness of such proceedings.

The disadvantages of administrative proceedings to defendants are so substantial that even the threat of bringing an administrative proceeding has provided the Commission with significant leverage in inducing defendants to cooperate or settle. See Choi & Pritchard at 21-22. As former SEC Enforcement Director Ceresney acknowledged, "There have been a number of cases in recent months where we had threatened administrative proceeding . . . and they settled." Sarah N. Lynch, *U.S. SEC to File Some Insider-Trading Cases in Its In-House Court*, Reuters, June 11, 2014, perma.cc/X9UJ-MZ4M.

Moreover, the real-world impact of decisions by SEC ALJs extends beyond the individual enforcement actions over which the ALJs preside. Agencies, and particularly the SEC, have long used administrative proceedings to establish generally applicable standards and policies—eschewing the formal rulemaking process in favor of case-by-case adjudication. See David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921, 926 (1965); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 201-203 (1947).

The increased use of administrative proceedings accordingly produces a correspondingly greater role for ALJs in agency policymaking. It also transfers responsibility for construing and interpreting the securities laws from federal courts to ALJs because federal courts reviewing administrative decisions defer to ALJs' legal conclusions. See Rakoff at 10-12; Grundfest at 1149, 1166-1167.

Indeed, the SEC's own internal guidance on forum selection recommends bringing an enforcement action as an administrative proceeding before an in-house ALJ, as opposed to as a civil action in court, if it "is likely to raise unsettled and complex legal issues under the federal securities laws, or interpretation of the Commission's rules." SEC, *Division of Enforcement Approach to Forum Selection in Contested Actions* 3, goo.gl/3nXWwC.

II. SEC ALJs Have Been Hired Using A Diffuse And Opaque Process.

The important responsibilities exercised by SEC ALJs in enforcement proceedings should require a selection process that clearly locates the responsibility for appointing these officials.

But SEC ALJs are appointed through a convoluted process involving low-ranking federal employees. Indeed, the process by which SEC ALJs are hired is so impenetrable that even the Commission itself has had difficulty determining by whom and through what process SEC ALJs are appointed.[2]

In *Matter of Timbervest*, the Division of Enforcement submitted an affidavit purporting to "set[] forth the manner in which administrative law judge ('ALJ') Cameron Elliot and Chief ALJ Brenda Murray were hired, including the method of selection and appointment." Notice of Filing at 1, *Timbervest, LLC*, SEC Admin. Proceeding File No. 3-15519 (June 4, 2015), sec.gov/litigation/apdocuments/3-15519-event-

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[2] In November 2017, after filing its response to the certiorari petition in this case, the SEC purported to ratify the prior appointment of the current SEC ALJs. SEC, *Pending Administrative Proceedings*, sec.gov/litigation/opinions/2017/33-10440.pdf.

139.pdf. The Division explained that under the then-applicable statutes and regulations, the SEC hired its ALJ through a process overseen by the U.S. Office of Personnel Management (OPM). *Id.* at 2.

OPM administers the competitive examination for selecting ALJs and provides to the SEC Chief ALJ a list of eligible candidates. *Ibid.* The Chief ALJ and an interview committee then make a preliminary selection from the top three candidates on the list, which is subject to final approval and processing by the SEC's Office of Human Resources. *Ibid.*

However, the Division admitted that it could not state with certainty how and by whom Chief ALJ Murray was appointed because "it is possible that internal [hiring] processes have shifted over time," and "information regarding hiring practices at [the time Chief ALJ Murray was hired] is not readily accessible." *Id.* at 2-3.

Furthermore, although the Division asserted that ALJ Elliot was hired pursuant to the procedures set forth in the affidavit, it explained in a subsequent filing that its description of how ALJ Elliot was hired was incorrect. As ALJ Elliot himself stated at a hearing in another case, "the Division's description of how I was hired [in the *Timbervest* affidavit] was erroneous." Br. of Respondents to the Commission's May 27, 2015 Order, *Timbervest, LLC*, SEC Admin. Proceeding File No. 3-15519 (June 23, 2015), Exhibit C (June 18 and June 19, 2015 Hearing Transcripts, *Bebo and Buono*, SEC Admin. Proceeding File No. 3-16293 (June 18, 2015)). Because he had been an ALJ in the Social Security Administration prior to being hired as an SEC ALJ, he simply sent in his resume in response to a posting on the federal government's job-posting website, interviewed, and was given an

offer. Notably, he still could not say who appointed him.

This window into the appointment process illustrates that those who appoint SEC ALJs are far removed from any accountability for the consequential actions of the SEC ALJs they appoint: Not only are those individuals unelected, and also not appointed by the President and confirmed by the Senate, but they are also largely indiscernible to the public. This diffusion of responsibility is the precise evil that the Framers sought to prevent by including the Appointments Clause in the Constitution.

III. SEC ALJs Are "Officers" Who Must Be Appointed In Accordance With The Appointments Clause.

A. The Clause Ensures Accountability For Appointments Of Officials Who Exercise Significant Executive Authority.

The Constitution's separation of powers, with its attendant checks and balances, is "essential to the preservation of liberty," and also ensures that "[a] dependence on the people" is the "primary control on the government." The Federalist No. 51, at 261-262 (James Madison) (Garry Wills ed., 1982). The Appointments Clause is "among the significant structural safeguards of the constitutional scheme." *Edmond* v. *United States*, 520 U.S. 651, 659 (1997); see also *Freytag* v. *Commissioner*, 501 U.S. 868, 880 (1991). It serves this role in two ways.

First, the Clause "prevents congressional encroachment upon the Executive and Judicial Branches" by "vesting the President with the exclusive power to select the principal (noninferior) officers of the United States." *Edmond*, 520 U.S. at 659.

Second, with respect to "inferior Officers," the Clause grants Congress "only limited authority to devolve appointment power on the President, his heads of departments, and the courts of law." *Freytag*, 501 U.S. at 884. See also U.S. Const. art. II, § 2, cl. 2; *Weiss* v. *United States*, 510 U.S. 163, 184-185 (1994); *Ryder* v. *United States*, 515 U.S. 177, 182 (1995) ("The [Appointments] Clause is a bulwark against one branch aggrandizing its power at the expense of another branch.").

Third, by limiting the power of appointment to the President and, in the case of inferior officers, to the heads of departments and the courts, the Appointments Clause ensures that those wielding the appointment power are "accountable to political force and the will of the people." *Freytag*, 501 U.S. at 878, 884. The Framers recognized that when the power of appointment is dispersed among multiple people, "[s]candalous appointments to important offices" are made, and it is impossible to "determine[] by whose influence [the people's] interests have been committed to hands so unqualified, and so manifestly improper." The Federalist No. 70 at 359 (Alexander Hamilton) (Garry Wills ed., 1982). Accordingly, the Constitution "carefully husband[s] the appointment power to limit its diffusion" (*Freytag*, 501 U.S. at 883) and thus permits the people to "determine what part had been performed by the different actors" (The Federalist No. 77 at 389 (Alexander Hamilton) (Garry Wills ed., 1982)). That in turn ensures that those wielding the appointment power are "accountable to political force and the will of the people." *Freytag*, 501 U.S. at 884.

Consistent with this history, the Court has held that "any appointee exercising significant authority

pursuant to the laws of the United States" is an "Officer of the United States" who must be appointed in accordance with the Appointments Clause. *Buckley* v. *Valeo* 424 U.S. 1, 126 (1976); see also *id.* at 132 ("Unless their selection is elsewhere provided for, *all* Officers of the United States are to be appointed in accordance with the Clause." (emphasis added)); *Freytag*, 501 U.S. at 881.

The class of officials covered by the Clause is "unusually broad," including:

> (1) A district court clerk, [*Ex parte Hennen*, 38 U.S. 230, 257-258 (1839)]; (2) "thousands of clerks in the Departments of the Treasury, Interior and the othe[r]" departments, [*United States* v. *Germaine*, 99 U.S. 508, 511 (1878)], who are responsible for "the records, books, and papers appertaining to the office," [*Hennen*, 38 U.S. at 259]; (3) a clerk to "the assistant treasurer" stationed "at Boston," [*United States* v. *Hartwell*, 73 U.S. 385, 392 (1868)]; (4 & 5) an "assistant-surgeon" and a "cadet-engineer" appointed by the Secretary of the Navy, [*United States* v. *Moore*, 95 U.S. 760, 762 (1878); *United States* v. *Perkins*, 116 U.S. 483, 483 (1886)]; (6) election monitors, [*Ex parte Siebold*, 100 U.S. 371, 397-399 (1880)]; (7) United States attorneys, [*Myers* v. *United States*, 272 U.S. 52, 159 (1926)]; (8) federal marshals, [*Siebold*, 100 U.S. at 397; *Morrison* v. *Olson*, 487 U.S. 654, 676 (1988)]; (9) military judges, [*Weiss*, 510 U.S. at 170]; (10) judges in Article I courts, [*Freytag*, 501 U.S. at 892]; and (11) the general counsel for the Department of Transportation, [*Edmond*, 520 U.S. at 666].

Free Enter. Fund v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 539-540 (2010) (Breyer, J., dissenting) (citations altered).

Particularly relevant to determining the status of SEC ALJs is this Court's holding in *Freytag* that special trial judges of the U.S. Tax Court are "inferior officers" based on the "significance of the duties and discretion that [they] possess." 501 U.S. at 881. The Court emphasized that special trial judges "perform more than ministerial tasks"; they "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders," and they exercise significant discretion in carrying out those "important functions." *Id* at 881-882.[3]

Since *Freytag*, this Court held—virtually summarily—that military judges are officers subject to the Appointments Clause. See *Edmond*, 520 U.S. at 662; *Weiss*, 510 U.S. at 169-170.

B. SEC ALJs Are "Officers" Because They Exercise Significant Authority Pursuant To The Laws Of The United States.

The Court's precedents make clear that SEC ALJs are "Officers" required to be appointed in compliance with the Appointments Clause.

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[3] The Court held in the alternative that "[e]ven if the duties of special trial judges" in cases in which they did not have final decision-making authority "were not as significant as [it had] found them to be," the judges' authority to enter final decisions in other cases would suffice to make them "officers." *Id.* at 882.

1. SEC ALJs exercise significant authority.

The authority and discretion of SEC ALJs are indistinguishable from the duties of the special trial judges that the *Freytag* Court found sufficiently "significan[t]" to render special trial judges "officers" under the Appointments Clause. 501 U.S. at 881-882.

The SEC has delegated to ALJs responsibility for the "fair and orderly conduct of [administrative] proceedings" (17 C.F.R. 200.14(a)), and thereby empowered the ALJs to "perform more than ministerial tasks" (*Freytag*, 501 U.S. at 881).[4] An SEC ALJ has "authority to do all things necessary and appropriate to discharge his or her duties." 17 C.F.R. 201.111. That includes, but is not limited to: issuing, revoking, quashing, and modifying subpoenas; receiving evidence and ruling on the admissibility of evidence and offers of proof; regulating the course of a proceeding and the conduct of the parties and their counsel; examining witnesses; ordering and regulating document production and depositions; ruling on all procedural and other motions; sanctioning contemptuous conduct; and preparing an initial decision containing factual findings and legal conclusions, the reasons or basis thereof, and an appropriate order, sanction, and relief. *Id.* §§ 200.14(a), 201.111,

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[4] Like the office of special trial judge, the office of SEC ALJ is established by law. The Administrative Procedure Act creates the office of the administrative law judge, and sets forth the ALJ's duty of presiding over adjudicatory hearings. 5 U.S.C. 556, 557; see also *id.* §§ 3105, 5372 (setting forth means of appointment and salary). The federal securities laws, in turn, authorize the SEC to "delegate * * * any of its functions to * * * an administrative law judge." 15 U.S.C. 78d-1(a).

201.180, 201.230, 201.233, 201.360. See also 5 U.S.C. 557(c). See generally 5 U.S.C. 556(c).

The ALJ's initial decision is "deemed the action of the [SEC]," unless a party or other person entitled to review files a timely petition for review or the SEC on its own initiative exercises its discretionary right to review. 15 U.S.C. 78d-1(c). See also 17 C.F.R. 201.360(d); 5 U.S.C. 557(b). Even in those cases in which a party appeals the ALJ's decision, the SEC retains discretion to decline to review the ALJ's decision, except in a few specified circumstances. See 17 C.F.R. 201.411(b). As a practical matter, 90 percent of ALJ initial decisions become final without review by the SEC. See *Bandimere* v. *United States*, 844 F.3d 1168, 1187 (10th Cir. 2016).

In other words, SEC ALJs "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders." *Freytag*, 501 U.S. at 881-882.[5] And "[i]n the course of carrying out these important functions, the [ALJs] exercise significant discretion." *Id.* at 882. These characteristics, which led the Court in *Freytag* to find special trial judges of the Tax Court to be "Officers" subject to the Appointments Clause, likewise compel the conclusion that SEC ALJs are "Officers."

2. Final decision-making authority is not an indispensable characteristic of "Officers."

The D.C. Circuit panel rested its contrary conclusion solely on the fact that SEC ALJs lack the au-

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[5] Although SEC ALJs do not have the power to impose fines or imprisonment for contempt, they have the authority to impose other sanctions for contemptuous conduct. See 17 C.F.R. 201.180.

thority to issue final decisions. Pet. App. 13 ("Our analysis begins, and ends," with the question of "whether Commission ALJs issue final decisions of the Commission."). That determination, however is inconsistent with this Court's decision in *Freytag*, and with the Court's subsequent decisions interpreting the Appointments Clause.

The *Freytag* Court squarely *rejected* the argument that "special trial judges may be deemed employees in [certain cases] because they lack authority to enter a final decision." 501 U.S. at 881. That view, the Court held, "ignore[d] the significance of the duties and discretion that special trial judges possess" (*ibid.*)—statutorily established office, duties, salary, and means of appointment, and performance of the "important functions" of "tak[ing] testimony, conduct[ing] trials, rul[ing] on the admissibility of evidence, and hav[ing] the power to enforce compliance with discovery orders." *Id.* at 881-882.

It was on the basis of these "significan[t]" duties and the "significant discretion" special trial judges had in performing those duties—the very same powers possessed by SEC ALJs—that the Court held that special trial judges were officers for purposes of the Appointments Clause. *Ibid.*

To be sure, after the Court found that special trial judges qualified as "officers" based on their role and discretion in regulating the trial process, it went on to set forth a separate and independent basis for finding the judges to be officers. "*Even if* the duties of special trial judges" were not as significant as the Court had just found them to be—and thus not sufficient by themselves to qualify special trial judges as officers—the Court's conclusion that special trial judges are inferior officers "would be unchanged" be-

cause special trial judges have the authority to enter final decision in some categories of cases. *Id.* at 882 (emphasis added).

That authority, the Court explained, was sufficient to categorize special trial judges as inferior officers in all cases, even if the Court assumed that in some cases the judges had neither final decision-making authority nor other significant duties. *Id.* In other words, *Freytag* stands for the proposition that final decision-making authority in some matters would be sufficient to make an official an "officer" for all purposes, even where his other functions are not "significant." But final decision-making authority in all matters is not necessary for "officer" designation.

Subsequent cases confirm this interpretation of *Freytag*. In *Weiss*, decided just a few years after *Freytag*, this Court held that military judges qualify as officers subject to the requirements of the Appointments Clause. See 510 U.S. at 170. Military judges "rule[] on all legal questions, and instruct[] court-martial members regarding the law and procedures to be followed," and, where the accused elects, decide guilt or innocence and impose sentences. *Id.* at 167-168.

However, "[n]o sentence becomes final until it is approved by the officer who convened the court-martial," and the judges' factual findings, legal rulings, and sentences are subject to *de novo* review by the Courts of Military Review.[6] *Id.* at 168. See also *id.* at 193 (Souter, J., concurring); 10 U.S.C. 864, 866,

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[6] The Courts of Military Review were renamed the Courts of Criminal Appeals. See National Defense Authorization Act for Fiscal Year 1995, Pub. L. 103-337, § 924, 108 Stat. 2663, 2831 (1994).

869. Notwithstanding the military judges' inability to enter final decisions, the Court held that "because of the authority and responsibilities they possess," military judges "act as 'Officers' of the United States." *Weiss*, 510 U.S. at 169.[7]

Similarly, in *Edmond*, the Court held that judges on the Coast Guard Court of Criminal Appeals are inferior officers for purposes of the Appointments Clause. 520 U.S. at 666. The Court expressly recognized that those judges "have no power to render a final decision on behalf of the United States unless permitted to do so by other executive officers." *Id.* at 665. Nevertheless, the Court "[did] not dispute that military appellate judges are charged with exercising significant authority on behalf of the United States," which rendered them officers under the Appointments Clause. *Id.* at 662.

Indeed, the Court recognized that being subject to review is inherent to the definition of an "inferior officer," who is subject to the Appointments Clause: "[W]e think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate." *Id.* at 663.

Thus, in both *Weiss* and *Edmond*, this Court confirmed that the authority to enter final decisions is relevant to distinguishing *inferior* officers from *principal* officers, not to distinguish inferior officers from

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[7] The precise issue in *Weiss* was whether the Appointments Clause requires military officers to obtain a separate appointment before serving as military judges. The Court noted that the parties agreed "rightly so" that the Appointments Clause applied to the military judges. 510 U.S. at 170.

mere employees whose appointments are not subject to the strictures of the Appointments Clause. The decision below cannot be squared with these precedents, and the interpretation of the Clause that it embraced unjustifiably excludes scores of officials with significant influence over the interests of the people from the accountability-preserving protections of the Appointments Clause.

* * *

The Appointments Clause is no mere formality; and its application similarly does not turn on a formalistic rule based solely on whether an official possesses final decision-making authority. Rather, the Framers recognized that officers—both inferior and principal—exercise government authority that can profoundly influence the lives and interests of the people. They therefore sought to "preserve political accountability relative to important government assignments" by enshrining in the Constitution a carefully cabined and transparent method of appointing individuals to such assignments. *Edmond*, 520 U.S. at 662.

The SEC ALJs at issue here unquestionably hold "important government assignments," and therefore must be appointed pursuant to the requirements of the Appointments Clause so that the people may hold the appointing authority—and ultimately the President—accountable for the consequential actions of SEC ALJs.

By some estimates, there are approximately 1,500 other ALJs across all federal agencies, see *Free Enter. Fund*, 561 U.S. at 542-543 (Breyer, J., dissenting); *Bandimere*, 844 F.3d at 1199 (McKay, J., dissenting), of which fewer than 200 preside over adver-

sarial proceedings as SEC ALJs do. But whether those other ALJs are also officers for purposes of the Appointments Clause turns on the scope of their particular functions and duties. And whether there is a violation of the Appointments Clause turns on how those ALJs are selected.[8]

Importantly, holding that an official was appointed in violation of the Appointments Clause does not automatically invalidate all of that official's decisions. Applying the *de facto* officer doctrine, the Court has precluded collateral Appointment Clause challenges to decisions that have become final—considering such challenges when, as here, the issue is raised on direct review. See, *e.g.*, *Ryder* v. *United States*, 515 U.S. 177 (1995).

CONCLUSION

The judgment of the court of appeals should be reversed.

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[8] In addition, the number of ALJs is dwarfed by the "*thousands* of clerks in the Departments of the Treasury, Interior and the othe[r]" departments who the Court has recognized are officers for purposes of the Appointments Clause. *Germaine*, 99 U.S. at 511 (emphasis added).

Respectfully submitted.

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